APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 55826

MISKOVSKY,

Appellee,

v.

OKLAHOMA PUB. CO.,

Appellant.

January 12, 1982

Appeal from District Court, Cleveland County; Preston A. Trimble, Judge

Appeal from a jury verdict awarding compensatory and punitive damages in a libel case to appellee. We find that the evidence of defamation, falsehood and malice presented by appellee was insufficient to permit the submission of the cause to a jury. Reversed and remanded with instructions.

Everett J. Sweeney and E. Joe Lankford, Norman, and Carroll E. Gregg, Oklahoma City, (Of Counsel), David A. Anderson, Professor of Law, University of Texas, Texas Law School, Austin, Tex., for appellee.

David Machanic, Michael Minnis, Pierson, Ball & Dowd, Oklahoma City, and Tom A. Lucas of Lucas & Cate, Norman, for appellant.

BARNES, V.C.J. The dispositive issue in this cause is whether the evidence presented by a candidate for the United States Senate, George Miskovsky, in a libel action against a local publisher, Oklahoma Publishing Company (OPUBCO), was sufficient to permit the submission of the cause to a jury. We hold that it was not.

The facts of the cause before us are as follows: In August of 1978, eight Oklahomans had become candidates for the Democratic nomination for the office of the United States Senate. Among the candidates were, then Governor, David Boren, former State Senator and Representative, George Miskovsky, and Anthony Points, a newcomer to the political arena. During the campaign, Mr. Miskovsky, along with other candidates, was invited to attend a candidates' forum conducted by the Women's Democratic Club of Canadian County in El Reno, Oklahoma. Although Mr. Miskovsky, Mr. Points, and another candidate, Mr. Bridges, accepted the invitation, other Democratic candidates did not attend the forum, which was held at the Ponderosa Restaurant. During the forum, each candidate was invited to make a brief statement. While addressing the group, candidate Points read from a political flyer, copies of which he had distributed to the audience. In part the flyer read:

> "I am against homosexuals or bisexuals in office or government. They are threats to our national security. They are subject to being blackmailed and will give out a favor or leak information from the government in return for having their homosexual identity kept secret.
>
> "There is a side to David Boren that is a known fact in legal and political circles. And that's the fact that David Borden frequents with homosexuals and I'm putting it lightly.
>
> "I don't think that is what you want for a U.S. Senator."

In addition to reading these remarks, candidate Points categorically stated that "Governor David Boren is a homosexual."

Mr. Miskovsky, on the following day, August 10, 1978, delivered a letter to the office of Governor Boren in which he set forth Mr. Points' charges against Boren, asking

the Governor to answer several questions. That letter read as follows:

"The Honorable David Boren
Governor State of Oklahoma
State Capitol
Oklahoma City, Oklahoma

Dear Gov. Boren:

Yesterday I attended a noon meeting of the Canadian County Democratic Women's Club at the Ponderosa Restaurant in El Reno. About three dozen members of the club were present as well as club vice president, Mrs. Donald J. (Floretta) Cholston of El Reno, and two other Democratic candidates for the U.S. Senate, Dean Bridges and Anthony Points.

I was called upon to address the group about issues and I did, as did Mr. Bridges.

Mr. Points addressed the group and distributed a campaign flyer (a copy of which is enclosed herewith) containing the following verbatim transcript: 'I am against homosexuals in the school system. They are a threat to our children. They are like vultures 'preying' on our young.'

'I am against homosexuals or bisexuals in office or government. They are a threat to our national security. They are subject to being blackmailed and will give out a favor or leak information from the government in return for having their homoxesual identity kept secret.'

'There is a side to David Boren that is a known fact in legal and political circles. And that's the fact that David Boren frequents with homosexuals and I'm putting it lightly.'

'I don't think that is what you want for a U.S. Senator.'

In addition to distributing the above written bulletin, Mr. Points added, among other things, the oral categorical statement, 'David Boren is a homosexual.'

After the meeting one of the ladies said she had not heard of this before, and others said they had heard rumors about the charge.

It is the first time I have heard this direct, categorical statement made in public by a candidate for the U.S. Senate.

For this reason I am asking you to respond to the following questions:

Do you know what a homosexual or bisexual is?

Are you a homosexual or bisexual?

Have you ever been a homosexual or bisexual?

Have you ever engaged in homosexual or bisexual activity?

I believe it is the right of every citizen, if it can be ascertained, to know if a candidate for U.S. Senator is afflicted with this kind of abnormal behavior.

A U.S. Senator has access to highly sensitive information vital to the defense of this country and our NATO allies.

I believe it is the right of every citizen to know if a candidate is afflicted with any physical, mental or philosophical weakness that might be dangerous to our national security or which might jeopardize the best interests of the majority of the people.

If a candidate is a homosexual, a person who is mentally deranged or a person of bizarre philosophical demeanor, then, the people have a right to know it.

And the candidate should disclose it in order to protect his effectiveness as the representative of the majority and free himself from any politically moti-

vated intrigue, blackmail, extortion or compromise to prevent disclosure of his true identity.

The people are entitled to an immediate response. Such response should be subscribed by you under oath.

Sincerely,

George Miskovsky"

The letter was delivered to the Governor's office approximately ten minutes prior to a press conference held by Mr. Miskovsky. At the press conference, Mr. Miskovsky told members of the press and the media of Mr. Points' statement and of his letter to the Governor.

In preparation for the press conference, Mr. Miskovsky's press agent personally called various members of the media, telling them that this was going to be a "hot" press conference that would be worthy of their attention.

Governor Boren, who was out on the campaign trail, and away from the Capitol, upon hearing of Miskovsky's press conference, flew back to Oklahoma City and held a make-shift press conference at Wiley Post Airport, categorically denying the charges against him.

The next day, August 11, 1978, the Oklahoma Publishing Company (OPUBCO), publisher of *The Daily Oklahoman*, a morning paper, and *The Oklahoma City Times*, an evening paper, published three news articles and an editorial dealing with Mr. Points' charges, Mr. Miskovsky's press conference, and the Governor's response to these events. A few days later, OPUBCO also published an editorial cartoon lampooning Miskovsky's actions. These five publications—three news articles, an editorial, and an editorial cartoon—are the publications which Mr. Miskovsky claims libeled him.

I.

Before addressing the issues presented, we will first discuss the burden which Mr. Miskovsky was required to

meet in order to have his case presented to a jury. Because Mr. Miskovsky admits that for the purposes of this libel action, he is a "public figure", there is no question that the *New York Times v. Sullivan* standards are applicable in this cause. In *New York Times v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964), in considering a libel action brought by an elected Commissioner of the City of Montgomery, Alabama—a public official—the United States Supreme Court, in discussing the right of free speech and free press guaranteed by the First Amendment to the United States Constitution, noted that cases such as the one before us are considered against ". . . . a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." The Court then went on to note that an ". . . . erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have 'breathing space'. . . ."

The Court later quoted with approval language of Justice Burch of the Supreme Court of Kansas in *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908), stating:

> " 'It is of the utmost consequence that the public should discuss the character and qualifications of candidates for their suffrages. The importance to the State and to society of such discussion is so vast, and *the advantages derived are so great, that they more than counterbalance the inconvenience of private persons* whose conduct may be involved, and *occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great.* The public benefit from publicity is so great, and the chance of injury to private character is so small, that such discussion

must be privileged.'" (78 Kan. at 725, 98 Pac. at 286.) [Emphasis added]

Based upon our "profound national commitment to the principal that debate on public issues should be uninhibited, robust and wide open," and the "breathing space" needed to protect the freedoms of expression, the United States Supreme Court held that the constitutional guarantees required a Federal rule which prohibited public officials from recovering damages in libel actions, unless certain prerequisites were met. The Court stated:

> "The constitutional guarantees require, we think, a Federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct, unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U.S. at 279-80, 11 L. Ed. 2d at 706, 84 S. Ct. at 726.)

This "New York Times standard" was later found to apply not only to public officials, but also "public figures".[1] As Mr. Miskovsky was a public figure, the standard quoted above applies in the case at hand. Thus, in order to prevail, Mr. Miskovsky must show:

(1) The publication of a defamatory statement;

(2) That the defamatory statement was false; and

(3) That the defamatory falsehood was made with "actual malice"—made with knowledge that it was false, or with reckless disregard of whether it was false or not.

In discussing the element of "actual malice", the United States Supreme Court, in *New York Times v. Sullivan*, held that the Constitution demanded that malice be shown with "convincing clarity".[2] Additionally, the Supreme Court noted that there was evidence that the New York Times published the alleged libelous publication without

checking its accuracy against the news stories in the Times' own files. In rejecting the plaintiff's contention that such failure to check constituted sufficient evidence of malice, the Court stated:

> ". . . . The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, *since the state of mind required for actual malice would have to be brought home to the person in the Times' organization having responsibility for the publication of the advertisement.*"

Thus, we see that Mr. Miskovsky, in order to prove malice, must not only show that the state of mind required was brought home to the persons in OPUBCO's organization having responsibility for the publication of the alleged libelous publications, but must also do so with convincing clarity.

The constitutionally mandated proof of "actual malice" was further defined in *St. Amant v. Thompson*, 390 U.S. 727, 20 L. Ed. 2d 262, 88 S. Ct. 1323 (1968). In that case, the Court noted that although "reckless disregard" could not be fully encompassed in one infallible definition, it did require that a defendant entertain some doubt as to the truth prior to publication, stating:

> ". . . . Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. *There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubt as to the truth of his publication.* Publishing with such doubt shows reckless disregard for truth or falsity and demonstrates actual malice." (390 U.S. at 731, 20 L. Ed. 2d at 267, 88 S. Ct. at 1325.)

In so ruling, the Supreme Court went on to note that:

> ". . . . Concededly, the reckless disregard standard may permit recovery in fewer situations than would

a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But New York Times, and succeeding cases, has emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censureship and thus adequately implement the First Amendment policy." (390 U.S. at 731-32, 20 L. Ed. 2d at 267, and 88 S. Ct. at 1326.)

II.

In *New York Times v. Sullivan*, the Court states:

". . . . This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases view the evidence to make certain that these principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.'" (370 U.S. at 285, 11 L. Ed. 2d at 798, 84 S. Ct. at 728.)

Like the U.S. Supreme Court, we also, in proper cases, must review the evidence to make certain that constitutional principles have been correctly applied. The case before us is such an instance. After reviewing the evidence, we conclude that with respect to each publication, Mr. Miskovsky has failed to present evidence of defamation, falsehood, and malice, sufficient to present the issue to a jury.

We will first examine the three news articles which Mr. Miskovsky argues were defamatory.

The first article which allegedly defames Mr. Miskovsky appeared in The Daily Oklahoman on August 11, 1978, with the headline, "Sex Charge a Lie, Governor Boren Replies". This article was a straightforward

account informing the reader that candidate Miskovsky had called a press conference, and that Mr. Miskovsky had asked Governor Boren to answer accusations made by another candidate that Boren was a homosexual. The article goes on to detail statements made by Mr. Points, Governor Boren's denial of the charges. Additionally, the article quoted from portions of Mr. Miskovsky's letter to Governor Boren, and reported reactions to the accusations and Mr. Miskovsky's letter, by both Governor and Mrs. Boren. Miskovsky argues that within this article the seed of conspiracy between him and Points is planted in the public's mind when the article stated:

> "Asked if he thought Miskovsky and Points worked together to discredit him, Boren replied, 'I will just have to leave that to your own speculation.'"

We simply find no merit to Mr. Miskovsky's position that the article, because of the above quoted paragraph, is libelous. The statement quoted is neither false nor defamatory. Because Mr. Miskovsky used Mr. Points' statements, it is understandable that the news media might wonder if Mr. Miskovsky and Mr. Points were working together. It was certainly not libelous to inquire of the Governor whether he thought such could be the case, nor was it libelous to report the Governor's response. The statement does not defame Mr. Miskovsky, as it neither holds him up to ridicule, scorn, or contempt. Nor can the statement be said to be libelous, because the statement is not false. For these reasons, we hold that the trial court erred in permitting the jury to consider this publication as possibly libelous.

The second article, entitled "Allegations Stir Storm", which also appeared in the August 11 issue of The Daily Oklahoman, began with the following lead:

> "Allegations against Gov. David Boren raised by fellow U.S. Senate candidates George Miskovsky and Anthony Points spurred a storm of indignation Thursday in the news media, were deplored by two

other candidates and prompted a flurry of support at Boren campaign headquarters."

Continuing, the article chronicled reactions to the events of the past day, quoting from various newspaper articles and radio broadcasts across the State. The article also reported the reactions of Governor Boren's campaign secretary, and the reactions of several other senatorial candidates. Among reactions chronicled were the following:

> "Rob Pyron, Boren's campaign secretary, said campaign headquarters was swamped with calls Thursday afternoon from persons voicing support for the governor and anger over the allegations of Points and Miskovsky.
>
> • • • •
>
> "Oklahoma City radio station KTOK said the names of Miskovsky and Points should be stricken from the election ballot.
>
> " 'Such loathsome and degrading statements, which have been made with no proof, speak eloquently of the kind of statesmanship either Miskovsky or Points would lend to the U.S. Senate if they were elected.'
>
> "The Shawnee News-Star editorialized in Friday editions that the charge that Boren is a homosexual 'would be more at home on the walls of a 'saloon toilet'.
>
> • • • •
>
> " 'Cesspool allegations have no place in the political arena. We believe George Miskovsky has no place in it any longer either.' "

Mr. Miskovsky argues that the above quoted statements are falsehoods which are defamatory. He argues that the allegations against Governor Boren were not made by him, but rather by Anthony Points alone. Thus, Miskovsky concludes that any suggestion that he made

the allegations is false, and defames him because it accuses him of a crime—criminal libel.

In addressing these contentions, we would first note that the statement that the allegations against Governor Boren were "raised" by George Miskovsky and Anthony Points is not a false statement. The American Heritage Dictionary of the English Language defines the word "raised" to include "increasing in strength or intensity, and arousing or stirring up." To say that Mr. Miskovsky did not increase the intensity of the allegations made by Mr. Points would be sheer nonsense. It was, after all, Mr. Miskovsky who called Mr. Points' statements to the public's attention. It was, after all, Mr. Miskovsky who called the press conference to discuss that very issue. And it was Mr. Miskovsky who wrote the Governor asking him to respond to the allegations.

The newspaper article also carefully pointed out that Mr. Miskovsky used Points' campaign material as the basis for "implications" of homosexuality. Thus, to report that various people in organizations across the State were disgruntled over the allegations of Mr. Points and Miskovsky could hardly be said to be false, for it was Miskovsky who took the utterances of a minor candidate and publicized them, making them a cause celebre. To hold that Mr. Miskovsky's actions could not be taken as implications of homosexuality would be a denial of the obvious.

With respect to the other statements in the article, in which OPUBCO reported that other news media had referred to Mr. Miskovsky's action as having won him "a place in state history saying he 'took the prize for the filthiest stunt that has ever been played by a serious candidate for major public office in this state' ", are simply all statements of opinion, which even Miskovsky admits in his brief are not actionable. As opinions they are not statements of fact, and therefore cannot be false.

For the above stated reasons, we hold that it was error to submit the article entitled "Allegations Stir Storm" to the jury, allowing them to find that this article had defamed Miskovsky.

The third and last news article was published by OPUBCO in The Oklahoma City Times on August 11, 1978. It was entitled "Boren's Friends Express Disgust". The article's lead read:

> "Longtime friends and close associates of Gov. David Boren expressed shock and disgust in his hometown today after allegations surfaced Thursday that he is a homosexual."

The article then went on to quote the reactions of several Seminole citizens, among them Ward Lynn, father-in-law of Boren's press secretary, Rob Pyron. It is the reporting of Mr. Lynn's comments which Mr. Miskovsky objects to, and characterizes as false and libelous. The paragraph dealing with Mr. Lynn's reaction read as follows:

> "Ward Lynn, father-in-law of Boren's press secretary, Rob Pyron, said he expected Miskovsky to be the 'hatchet man' in the campaign."

Although we can appreciate why Mr. Miskovsky is not fond of the epithet "hatchet man", such an epithet is not libelous because it is not a statement of fact, but rather a judgmental statement in which the maker of the same expresses his views. It is similar to calling someone a "scalawag", a "rake", or a "scoundrel". Such statements are opinionative and not factual in nature. Thus, such statements can hardly be said to constitute falsehoods. As they canont be false, they cannot be considered libelous. Thus, once again the trial court erred in submitting this article to the jury, allowing the jury to find such statements to be libelous.

We next turn to the editorial and editorial cartoon which Mr. Miskovsky argues libeled him. The editorial

cartoon, entitled "Miskovsky and Mud", appeared in The Daily Oklahoman on Friday, August 11, 1978. The editorial started out with the statement that:

> "George Miskovsky has sunk to a new low in Oklahoma political rhetoric—and for him that takes some doing.
>
> "In a press conference reported on elsewhere in The Oklahoman, the septuagenarian lawyer has attempted to inject some sign of vitality in his moribund campaign for the Democratic nomination for the U.S. Senate.
>
> "His tactic was to indirectly suggest, in the form of a letter asking questions, that Gov. David Boren has homosexual tendencies.
>
> "Were it not for the fact that American Law and tradition make it virtually impossible to libel or slander a political figure, Miskovsky's words would be actionable. As it is, they are merely despicable and stupid."

The editorial went on to state that it is on the record and on the positions taken on national issues that Boren's Senate candidacy should be weighed, and not ". . . . on the scurrilous defamation hurled by Miskovsky . . . . Miskovsky should save his gutter theatrics for the next time he is defending some scroundel in criminal court . . . ."

As above, opinionative statements, such as "scurrilous defamation" and "gutter theatrics" are not statements of fact, but statements of opinion. What one individual may consider scurrilous, another may think commendable. What one might consider "gutter theatrics", another may think of as "strategical genuis". Likewise, one might refer to an individual as a "scoundrel", while another thinks him a "saint". Such characterizations are not factual, but rather judgmental. Accordingly, they can-

not form the basis of a libel action, as they cannot be verified as true or false.

Lastly, the characterization of Miskovsky's words as "actionable" we do not believe accuses Mr. Miskovsky of a criminal action. In so holding, we would note that in *Greenbelt Coop. Pub. Asso. v. Bresler*, 398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537 (1977), the Supreme Court of the United States held that under the circumstances of that case, as a matter of constitutional law, it was clear that no reader could have thought that because of the use of the word "blackmail", the plaintiff was being charged with the commission of a criminal offense. We think it equally clear in the case at hand that no reasonable reader could have interpreted the statement that Mr. Miskovsky's words were actionable as imputing a criminal act to Mr. Miskovsky. In so holding, we note that no evidence at the trial was introduced to show that any reader interpreted the statement to have imputed the commission of criminal libel on Mr. Miskovsky's part. Accordingly, we cannot say that the statements in the editorial entitled "Miskovsky and Mud" could form the basis of a libel action. The court thus erred in submitting this article to the jury.

The last publication relied upon by Mr. Miskovsky in his libel action was an editorial cartoon published in The Oklahoma City Times on August 14, 1978. That cartoon is pictured below.

Mr. Miskovsky's position is that the cartoon is a direct representation that he put Points up to calling Governor Boren a homosexual, and that he was conspiring with Points, and that Miskovsky masterminded the conspiracy. Additionally, Miskovsky argues that the cartoon is defamatory, as it falsely imputes that he committed a crime—a criminal libel.

Without deciding, and even assuming, that the meaning attributed to the cartoon of Miskovsky was defama-

'Isn't that right, Anthony?'



tory and a statement of fact, there was no evidence that it was published with knowledge of falsity or with reckless disregard as to the truth of the cartoon.

Mr. Standard, who approved the cartoon for publication, testified that he saw the cartoon as showing a connection between Mr. Miskovsky and Mr. Points at the

press conference, but not prior to the press conference. He testified that:

> "Obviously, Mr. Miskovsky used Mr. Points as his whole excuse for calling the press conference and sending a letter to the Governor, and to that extent, sure, there was a connection."

As to the artificial halo over Mr. Miskovsky's head, Standard thought this denoted a self-righteous attitude on Miskovsky's part. To Standard, it meant that "Miskovsky was attempting to escape responsibility by, at the press conference, making it appear that Mr. Points had caused all of this, rather than Mr. Miskovsky."

Additionally, the cartoonist who drew the cartoon testified that his purpose in the cartoon was to comment on Miskovsky's asking Boren the four questions at the press conference. He "intended to show that Mr. Miskovsky was exploiting the words of Mr. Anthony Points." He further testified that when he drew the cartoon he did not intend to imply, nor did he think he implied, that Mr. Miskovsky was responsible for Mr. Points' statements. Mr. Lowe, the cartoonist, also testified that it did not enter his mind that the cartoon could be interpreted that way. While Mr. Miskovsky did show that the newspaper was out to "blister" him for his actions, and that the newspaper did favor Mr. Boren's candidacy over his, there simply was no evidence introduced to show that the paper intended to use false statements, or that the paper had any serious doubts as to the statements they published.

Lastly, even assuming further that the cartoonist or the person who approved the cartoon intended the meaning attributed to it by Miskovsky, there was no evidence that OPUBCO, at the time of publication, knew the meaning was false. The mere failure to investigate cannot establish reckless disregard for the truth; rather, those responsible for the publication of the cartoon must

act with a "high degree of awareness of . . . . probable falsity."[4] The evidence in this case did not reveal that OPUBCO had cause for such an awareness at the time of publication of the cartoon.

For the above stated reasons, we hold that the trial court erred as a matter of law in submitting the cause to the jury, as it was error to submit any of the five publications relied upon to the jury.

Accordingly, the action of the trial court is reversed, and the case is remanded to the trial court with directions to enter judgment for appellant OPUBCO.

It is so ordered.

IRWIN, J.J., HODGES, LAVENDER, SIMMS and HARGRAVE, JJ., and BACON and BOYDSTON, S.J., concur. DOOLIN, J., dissents.

Upon the disqualification of Justice WILLIAMS and Justice OPALA, the Honorable Kenneth D. BACON and the Honorable John D. BOYSTON were assigned to act as Special Justices in this case.

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[1] *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271 (1971). See *Washington v. World Publishing Co.*, 506 P.2d 913, 916 (Okla. 1972) (candidate for United States Senate a public figure).

[2] 376 U.S. at 285-86, 11 L. Ed. 2d at 710, 84 S. Ct. at 729. Also see *Beckley Newspapers Corporation v. Hanks*, 289 U.S. 81, 19 L. Ed. 2d 248, 88 S. Ct. 197 (1967).

[4] *Gerty* (sic) *v. Welch*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974).

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

Tuesday, April 6, 1982

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

* * * *

55,326 The Oklahoma Publishing Company v. George Miskovsky.

Rehearing denied.

CONCUR: Irwin, C.J., Barnes, V.C.J., Hodges, Lavender, Simms, Hargrave, JJ. and Bacon, Boydston, S.JJ., sitting in place of Opala and Williams, JJ. who disqualified.

DISSENT: Doolin, J.

* * * *

/s/ Pat Irwin
Chief Justice

APPENDIX C

Oklahoma City, OK Friday, August 11, 1978

SEX CHARGE A LIE, GOV. BOREN REPLIES

[Picture Omitted in Printing]

By Ed Montgomery and Michael Lee

U.S. Senate candidate George Miskovsky asked Gov. David Boren Thursday to answer an accusation by another candidate that Boren is a homosexual. Boren called the accusation "a vicious lie."

Miskovsky, one of Boren's opponents in the Aug. 22 Democratic primary, said a third candidate, Anthony Points, had stated flatly Wednesday that Boren is a homosexual.

If Points did, Boren countered, it was "a vicious lie."

At a hastily called press conference about 6 p.m. Thursday, at Wiley Post Airport in Oklahoma City, Boren said "I have been under much scrutiny since holding public office. People know how I've conducted myself publicly and privately."

Before returning from Woodward where he was campaigning Thursday afternoon, Boren said, "The statement is utterly ridiculous and categorically untrue. I don't know Mr. Points, but if he repeated such a vicious lie, I would not care to know him."

At a press conference, Miskovsky, former state senator and Oklahoma City attorney, distributed a two-page letter to Boren and a Points leaflet.

Miskovsky said Points had handed out the leaflet Wednesday at a meeting of the Canadian County Democratic Women's Club in El Reno.

In addition, Miskovsky said, Points made the statement, "David Boren is a homosexual."

Miskovsky would not say whether Points offered any proof, and Points could not be reached for comment Thursday night.

Mrs. Donald J. Gholston of El Reno, vice president of the club, confirmed Points made the statement. She said he offered no proof.

The Points leaflet distributed by Miskovsky said in part, "There is a side to David Boren that is a known fact in legal and political circles, and that's the fact that David Boren frequents with homosexuals and I'm putting it lightly. I don't think that is what you want for a U.S. senator."

Miskovsky's letter asked Boren to answer four questions, including one which asked, "Are you a homosexual or bisexual?"

Boren responded, "It is a shame a person has to be subjected to this kind of personal attack in order to serve the public. I particularly resent the statement because it reflects on the reputation of my wife, children and family as well as myself.

"This kind of tactic just makes even clearer to the people the contrast between their campaigns and the clean, positive campaign that I intend to continue."

Asked if he thought Miskovsky and Points worked together to discredit him, Boren replied, "I just have to leave that to your own speculation."

Boren was greeted at the airport by his wife Molly, and about 100 supporters who broke into a chant of "we want Boren" as he stepped from a plane.

Commenting on the statements, Mrs. Boren said, "I think that shows some of the other candidates are not winning on the issues."

She called the statements "character assassination."

Boren said he is "not surprised at anything that might happen." He said he will not change his campaign and will continue to run a "clean and positive campaign on the issues. Voters aren't interested in this kind of trash."

Miskovsky said he believes his questions to Boren are justified because the allegations were made by a candidate in a public meeting. These are his questions:

"Do you know what a homosexual or bisexual is?

"Are you a homosexual or bisexual?

"Have you ever been a homosexual or bisexual?

"Have you ever engaged in homosexual or bisexual activity?"

Miskovsky said he believes the public has a right to know if a candidate for the U.S. Senate has any "physical, mental or philosophical weakness" which might be dangerous to national security.

Boren, now 37, was the youngest governor in the nation when he was elected in 1974. He was divorced during his first year in office by his first wife, the former Janna Little of Madill. They had two small children.

The governor married Molly Shi of Ada on Nov. 27 in the governor's mansion.

Rob Pyron, Boren's campaign secretary, said the governor was campaigning in Alva and Woodward when he learned of the statements. "We contacted him by phone and he decided to come in and make a statement."

Pyron said the governor had planned to return to Oklahoma City Thursday evening and didn't break any commitments to hold the press conference.

APPENDIX D

Oklahoma City, OK Friday, August 11, 1978

MISKOVSKY, POINTS LASHED

ALLEGATIONS STIR STORM

Allegations against Gov. David Boren raised by fellow U.S. Senate candidates George Miskovsky and Anthony Points spurred a storm of indignation Thursday in the news media, were deplored by two other candidates and prompted a flurry of support at Boren campaign headquarters.

Also, Senate candidate Rosella Pete Saker, Altus, disclosed Points, whose campaign material Miskovsky used as basis for his implications of homosexuality, had raised the allegations against Boren in a phone conversation earlier this week.

Saker said Points "mentioned the probability that we'd be last, and maybe a few of us should get together and support one candidate."

He said when Points raised the Boren allegations in the conversation, "I told him that I didn't want to discuss it unless he had something other than accusations.

"I told him I wasn't interested in that type of thing," Saker said. "I feel a person that does that is riding a dirty trail."

Former U.S. Rep. Ed Edmondson, also a candidate for the Democratic nomination, said, "I really believe the charge is one unworthy of comment.

"I would hope the race will be decided on the issues before the people—the public issues, the public questions and the public records of the candidates."

The other Democratic candidates, Dean Bridges of Claremore and state Sen. Gene Stipe of McAlester, were

campaigning in western Oklahoma and could not be reached for comment.

Rob Pyron, Boren's campaign secretary, said campaign headquarters was swamped with calls Thursday afternoon from persons voicing support for the governor and anger over the allegations of Points and Miskovsky.

"The governor's personal secretary was alone here for about 35 minutes during the press conference and she said the three lines were going constantly," he said.

Pyron said some friends from law school were with the governor when the call came in about Miskovsky's statement, and they, plus others who called in later, have offered support and assistance in any legal action.

But later the governor, at a press conference at Wiley Post Airport, said a decision on a lawsuit would come after the election.

He added, however, "You have to prove you've been damaged to win a suit, and I don't believe anybody is foolish to believe such ridiculous allegations."

Meanwhile, at least four state newspapers and one radio station denounced Miskovsky's statement.

Calling it a "dirty attempt to smear Boren," the Oklahoma City Times said Miskovsky had reached a "new low" in state politics by his "gutter-type" letter to Boren.

It concluded, "But having raised the issue, Miskovsky perhaps should answer the same questions.

"So tell us, George, are you gay?"

During a Capitol press conference, Miskovsky said his answer to the four questions directed at Boren would be "no."

In an editorial for its Friday editions, the Tulsa World said the comments were "a voice from the sewer."

The World said Miskovsky won a place in state history saying he "took the prize for the filthiest stunt that has ever been pulled by a serious candidate for major public office in this state."

Oklahoma City radio station KTOK said the names of Miskovsky and Points should be striken from the election ballot.

"Such loathesome and degrading statements, which have been made with no proof, speak eloquently of the kind of statesmanship either Miskovsky or Points would lend to the U.S. Senate if they were elected."

The Shawnee News-Star editorialized in Friday editions that the charge that Boren is a homosexual "would be more at home on the walls of a saloon toilet."

"What was the basis for Miskovsky's question?" about Boren's sexual orientation, the News-Star asked. "Did he have any evidence? Any mystery witnesses? Any peephole photographs? Any torrid love letters or lurid diaries? Not at all.

"Cesspool allegations have no place in the political arena. We believe George Miskovsky has no place in it any longer either."

APPENDIX E

Oklahoma City Times Friday, August 11, 1978

BOREN'S FRIENDS EXPRESS DISGUST

SEMINOLE—Longtime friends and close associates of Gov. David Boren expressed shock and disgust in his hometown today after allegations surfaced Thursday that he is a homosexual.

"I'm extremely disappointed in that kind of tactic," the Rev. Bob Cocke, Boren's former pastor here, said today. "There's no truth in that I have any knowledge of.

"There's no doubt in my mind that this is a smear tactic," he said.

Kaulk said he has known Boren for nine years and that Boren was "very active" in the First Methodist Church here before he was elected governor in 1974.

"He served on our pastor-parish relations board for four years before he was elected governor," he said.

"I'm really shocked. I just can't believe it," he said of the allegations.

Lifelong friend Liz Robertson, co-owner of Adwan's Specialty Shop in Seminole, said she was shocked about the remarks.

"I think it is the dirtiest form of politics that can be done," she said "I've known him all of his life, and I can't imagine anyone would do that."

Ms. Robertson said she lived across the street from the Borens when they lived in Seminole and that her family has been friends with the Borens for years.

"We've spent many hours in his home and he in ours," Ms. Robertson said.

Ward Lynn, father-in-law of Boren's press secretary, Rob Pyron, said he expected Miskovsky to be the "hatchet man" in the campaign.

"I've known David all his life and I don't think there's any basis to it," Lynn said.

APPENDIX F

The Daily Oklahoman Friday, August 11, 1978

MISKOVSKY AND MUD

George Miskovsky has sunk to a new low in Oklahoma political rhetoric—and for him that takes some doing.

In a press conference reported on elsewhere in The Oklahoman, the septuagenerian lawyer has attempted to inject some sign of vitality in his moribund campaign for the Democratic nomination for the U.S. Senate.

His tactic was to indirectly suggest, in the form of a letter asking questions, that Gov. David Boren has homosexual tendencies.

Were it not for the fact that American law and tradition make it virtually impossible to libel or slander a political figure, Miskovsky's words would be actionable. As it is, they are merely despicable and stupid.

The governor also is a candidate for the Democratic senatorial nomination, along with several others. In the judgment of most observers he is running ahead of his challengers at this stage of the compaign, with Miskovsky generally acknowledged as going nowhere.

So what does an aging ex-politician, hungry for the limelight again, do in a situation like this? More often than not, he goes to the old mudball.

Whether David Boren becomes a U.S. senator from Oklahoma is not the issue here. That is a judgment the people of Oklahoma are perfectly capable of making for themselves without any dirty-trick assistance from the likes of Miskovsky.

What the public should bear in mind, however, is the fact that David Boren's public career, as a state legislator and governor, is a matter of widely publicized record.

There are legitimate differences of opinion about that record, depending on your point of view. But few informed persons in our state would argue that Boren's public service has not been honorable or that his motivation and intentions have not been in the public interest.

It is on that record, and on the positions he takes on national issues during the campaign, that Boren's Senate candidacy should be weighed—and not on the scurrilous defamation hurled by Miskovsky.

Of the other candidates in the race, not even wily State Sen. Gene Stipe, the wheeler-dealer from Little Dixie, has stooped so low as Miskovsky has.

Miskovsky should save his gutter theatrics for the next time he is defending some scoundrel in criminal court. Any man who so covets political office is the kind Oklahoma doesn't need in the U.S. Senate or anywhere else in public life.

Meanwhile, let's get on with hearing what the truly viable candidates for the Senate have to say about why they should be elected.

APPENDIX G

August 14, 1978 Oklahoma City Times

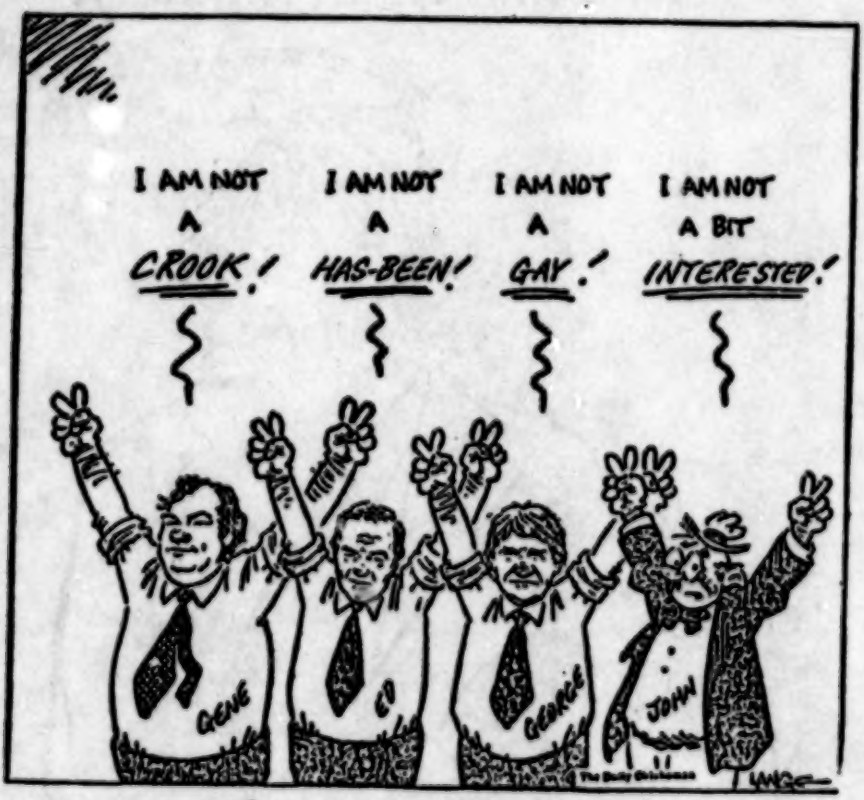
'Isn't that right, Anthony?'



APPENDIX H

August 16, 1978 — Daily Oklahoman

BOREN vs. BORIN



APPENDIX I

Oklahoma Statutes Tit. 12 § 1441

> Libel is a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation, or any malicious publication as aforesaid, designed to blacken or vilify the memory of one who is dead, and tending to scandalize his surviving relatives or friends.

APPENDIX J

IN THE DISTRICT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

No. C 79-401 (T)

GEORGE MISKOVSKY,
Plaintiff,

vs.

THE OKLAHOMA PUBLISHING COMPANY,
Defendant.

Filed May 27, 1980

INSTRUCTIONS

No. 1

LADIES AND GENTLEMEN OF THE JURY: The Plaintiff in this case George Miskovsky, is suing Defendant, The Oklahoma Publishing Company for the sum of $10,000,000.00 actual damages and $15,000,000.00 punitive damages. Plaintiff alleges that while a candidate for the United States Senate, he attended a meeting at the Ponderosa Restaurant in Canadian County, Oklahoma. Plaintiff alleges that at this meeting Mr. Anthony Points, also a candidate for the United States Senate, read from a flyer which contained defamatory remarks concerning U.S. Senate candidate David Boren. Plaintiff alleges he was libeled by three news articles, one editorial and one editorial cartoon which were printed by the Defendant. Plaintiff alleges that as a result of the articles, editorial and cartoon, the public was left with the false impression that Plaintiff originated the charges of homosexualty against David Boren and that this impression imputed a crime to Plaintiff. Plaintiff alleges that he has suffered injury to his character and reputation, professional standing in the community, and loss of income as a result.

Defendant has answered the allegations of the plaintiff and contends that the publications complained of were not defamatory and even if they were, they were privileged and matters of opinions.

No. 2

Plaintiff contends that defendant through its writings and cartoons falsely depicted plaintiff of not only accusing U.S. Senate Candidate David Boren of being a homosexual, but also engaging in concert, confederation, or conspiracy with U.S. Senate Candidate Anthony Points to falsely accuse Candidate Boren of being a homosexual and these depictions imputed to him a crime.

In this regard you are instructed that Criminal Libel is a crime under the penal code of the State of Oklahoma and is defined as a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation.

You are further instructed that Criminal Conspiracy is a crime under the penal code of the State of Oklahoma and is defined as follows:

If two or more persons conspire either:

1. To commit any crime; or
2. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws, they are guilty of a misdemeanor.

No. 3

The Plaintiff's claim consists of seven essential elements, each of which the Plaintiff and the Plaintiff alone bears the burden of proving.

Under our law a person's good reputation is held in high regard. When that reputation is attacked by false assertions of fact, the law gives the individual the opportunity to bring a libel action to recover damages.

When the plaintiff is a candidate for public office, as was the plaintiff here, he is considered to be a "public figure," and he must bear heavy burdens in order to make out a claim for which he can recover damages. A person who has assumed a role of special prominence in the affairs of society, or a person who has thrust himself to the forefront of particular public controversies in order to influence the resolution of the issues involved. A candidate for public office is a public figure.

No. 4

The Plaintiff has the burden of proving these allegations. If the Plaintiff fails to prove his allegations in accordance with the principles contained in these instructions, your verdict must be for the Defendant.

Libel is a false and malicious, unprivileged publication of facts by writing concerning a person which exposes that person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation.

No. 5

In order to recover the burden is upon the Plaintiff to prove by the Plaintiff's claim seven essential elements:

First, that the Defendant published written statements as opposed to oral statements;

Second, that the written statements constituted libel;

Third, that the written statements are defamatory on their face, that is, without the necessity of showing any additional facts to establish the defamatory nature of the statements;

Fourth, that the written statements were "of and concerning the Plaintiff;"

Fifth, that the written statements were published to third persons;

Sixth, that the written statements were false in some material, particular respect; and

Seventh, that the written statements which were false were published with actual malice as that term will be defined for you later in these instructions.

The burden is on the Plaintiff to prove the first five of these elements by a preponderance of the evidence.

The Plaintiff's burden with respect to the sixth and seventh elements, that is, proving that the statements were false and that they were made with actual malice, is much higher. The Plaintiff has the burden of proving these two elements by clear and convincing evidence.

If you find that the Plaintiff has established these seven elements by the standards that will be explained to you, you may find for the Plaintiff. If, on the other hand, you find that the Plaintiff has failed to establish any of these elements under the appropriate standard, then it is your duty to find for the Defendant.

As has been stated, the burden of proof of each element is on the Plaintiff. The Defendant is not obliged to call any witnesses or introduce any evidence on its behalf if the Plaintiff has failed to prove any one of the elements I have just described to you.

No. 6

In this case the alleged libel is contained in three newspaper articles, one newspaper editorial and one editorial cartoon. Exhibits 5, 6, 7, and 8. It is these items alone

upon which the Plaintiff's allegation of libel depends and you may not consider any other charges which may have been made by the Plaintiff in the course of this trial in determining his claim.

Other exhibits or publications, not complained of in Plaintiff's Petition, which have been admitted in evidence are not the basis for Plaintiff's claims of libel which you are considering. These other Plaintiff's exhibits which were admitted were admitted in evidence for, among other things, to support Plaintiff's contention that they furnish proof of either actual or expressed malice toward the Plaintiff on the part of the Defendant.

No. 7

If you find that the allegedly libelous publications are mere statement of opinions based on facts either in the publication or known to the public, then you must find for the Defendant.

No. 8

Defendant relies on the defense of fair comment. In this regard, you are instructed that the defense of fair comment is lost through clear and convincing proof of wilful or reckless disregard for truth.

No. 9

You are instructed that the law of free speech and press grants to the Defendant, in this case, a privilege to publish true, and accurate reports.

However, the freedom granted by law to the Defendant does not extend to false unprivileged statements or statements made with reckless disregard of whether they are false or not if such statements, which expose the Plaintiff to public hatred, contempt, ridicule or obloquy, or which tend to deprive him of public confidence or injure him in his profession or occupation.

No. 10

You are instructed that a republisher of a libel, such as the Plaintiff concerning Anthony Points' allegations, has the same culpability for libel as the one making the original statement. You must consider the rule concerning republication in deciding whether the Plaintiff has met his burden of proof that the Defendant's statements about him were false.

No. 11

You will recall that I instructed you that in order for a statement to be found libelous not only must it among other things be false and malicious, but also unprivileged. In this state a publisher may criticize the acts of a candidate for public office such as the Plaintiff was without fear of committing a libel unless the plaintiff was accused of committing a crime. Therefore, unless you find that the Plaintiff has proven by a preponderance of the evidence that the publication accused him of a crime, your verdict must be for the Defendant.

Even if you should find that the Plaintiff has proven that the publication accused him of a crime, you must find for the Defendant unless the Plaintiff has also proven the seven elements of his case as I have previously defined them for you.

No. 12

Libel is "a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloguy, or which tends to deprive him of public confidence, or to injure him in his occupation . . ."

No. 13

Everyone has the right to comment and express their opinion, especially on matters of public importance. Mis-

statements of fact in expressions of opinion are protected unless they are made with malice as defined in these instructions for the purpose of damaging another's reputation. Expressions or statements of opinion cannot be held to be libelous. This is true even though those expressions of opinion may be harsh, vituperative, and embarrassing to the Plaintiff.

No. 14

As a public figure, plaintiff has the burden of proving to you that the publications complained of were published with what is known in the law as malice.

In order to prove that he has been libeled by the defendant, plaintiff must prove the publications were knowingly false or were published with reckless disregard of whether they were true or not. Proof of malice requires evidence showing that the defendant published the material complained of with an awareness of the probable falsity of the publications or that there be sufficient evidence to permit the conclusion that the defendant, through its agents, published the alleged defamatory writings and cartoons with reckless disregard of the truth of the publications in order for the plaintiff to be entitled to recover damages from the defendant.

No. 15

Knowingly means possession of knowledge or information. It means an awareness of a material fact.

Knowingly simply means that a person is aware of the existence of the facts in question and that he has acted in consideration of such facts and produced the specific result.

No. 16

You are further instructed that you may find actual malice to exist if you find the material complained of to be false and that:

1. The false material was fabricated by the defendant or
2. The false material was the product of defendant's agent or agents' imaginations; or
3. The cartoons and writings published are so inherently improbable that only a reckless man would have put it in circulation; or
4. That the writings and cartoons complained of were knowingly false, or were published with reckless disregard of their falsity.

No. 17

If you find in favor of plaintiff you may then assess his actual compensatory damages. In this regard, you may take into consideration any loss in profits or income suffered by the plaintiff in his profession or business, as a direct and proximate result of libel and in addition, you may award the plaintiff such sum, as in your discretion the evidence dictates, that will compensate him for the impairment of his reputation and standing in the community, personal humiliation, mental anguish and suffering not to exceed the sum of $10,000,000.

No. 18

There are two types of damages, which you may award should you find for the plaintiff on the issue of libel.

The first type of damages is referred to as "Compensatory damages." These are damages awarded to compensate plaintiff for damage which you may find for the plaintiff if you find and believe plaintiff has proved he has suffered for the libel. Such damages must be shown as proximately caused by the libel.

One of the elements of compensatory damages for a libel claim is mental suffering of the plaintiff caused by the publication. Other elements are for exposing plaintiff

to public hatred, contempt, ridicule or obloquy, or which tend to deprive plaintiff of public confidence, or injury him in his profession or occupation.

A second element of compensatory damage may be damage and injury to character and reputation.

Should you find that plaintiff has established by clear and convincing evidence that the defendant acted with malice, as defined herein, then you may consider whether you wish, in your sole discretion, to award the second type of damages, which is referred to as exemplary or punitive damages.

Exemplary damages mean damages by way of example or punishment, and are not necessarily to be measured by the extent of the damage and injury. Exemplary damages are given as monetary punishment to make an example, not for the benefit of the plaintiff, but for the public good and for the purpose of preventing others from a repetition of like or similar conduct as to another person or persons similarly situated. A party asking for exemplary damages has only an incidental personal interest. His recovery is whole and complete with actual damages. Exemplary damages, is a tool to deter the wrongdoer, and is for society's benefit and not the plaintiff's. Exemplary or punitive damages may be awarded on the libel claim, only if you have awarded plaintiff actual or compensatory damages. Exemplary or punitive damages, if you in your discretion award them, are to be assessed in accordance with what would be an appropriate example and financial punishment to the defendant in question, in light of defendant's financial ability to pay and in light of the gravity of the libel complained of and in consideration of all the facts and circumstances. Thus, for the same wrong, you would not award substantial exemplary or punitive damages against a defendant of limited means, to the same extent you would against a defendant with greater financial capacity.

In no instance shall your award of exemplary damages exceed $15,000,000.00.

No. 19

A proximate cause is an act which, in a natural and continuous sequence produces the damage and without which the result would not have occurred.

No. 20

You are instructed that the burden is upon the plaintiff to prove his claim.

The defendant has no burden to prove anything. You must not base your decision on the trial tactics of the parties, the decision of the lawyers to rest their cases at the time they did, or any perceived actions of the parties after you render a decision.

IN CLOSING

This case is now submitted to you for your decision and verdict.

When you have arrived in the jury room you should first choose one of the jury as a foreman and then begin deciding the case. You must not use any method of chance in arriving at your verdict, but rest it on the opinion of each juror who agreees with it. The form of all possible verdicts will be sent to the jury room with you, along with these written instructions of the Court. If all twelve (12) of you agree on a verdict, select the one (1) correct form of verdict and only your foreman alone need sign it; if you do not all agree, but at least nine (9) or more of you do, then only those nine (9) or more agreeing will each, individually, sign the verdict form. Notify the Bailiff when you have arrived at a verdict so that you may return it in open court.

The jury is now placed in charge of the Bailiff and will be taken to the jury room.

GIVEN this 21st day of May, 1980 at

/s/ Preston Trimble
PRESTON TRIMBLE
District Judge